REPORTABLE

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **FAO (OS) NOS. 605-06 OF 2006**

% **Date of Decision** : 7th September, 2007.

EXPRESS TOWERS P.TD & ANR. .... Appellants.
Through Mr. Pravin K. Jain, Mr. L.K. Garg and Mr.V.K. Mehra, Advocates.

VERSUS

MOHAN SINGH & ORS. .... Respondents.
Through Mr. H.L. Narula, Advocate for respondents 1-2.

CORAM:

HON'BLE DR. JUSTICE MUKUNDAKAM SHARMA, CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not ? YES.

3. Whether the judgment should be reported in the Digest ? YES.

SANJIV KHANNA, J:

1. The appellants, Express Towers Pvt. Ltd. and its Director- Mr. R.C. Goel, have filed the present Appeal against the Order dated 22nd August, 2006 dismissing their application under Order XII, Rule 6 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as the Code, for short) for passing a decree of specific performance on the basis of admissions made by Mr.Mohan Singh and Smt. Jit Kaur, the respondent nos.

1 and 2 herein.

2. The appellants had entered into an "agreement to sell" dated 21st May, 1987 with the respondent nos. 1 and 2 for purchase of property no. B-7/118, Safdurjung Enclave, New Delhi for sale consideration of Rs.23.50 lakhs. Rs.1 lakh was paid in advance to the respondent nos. 1 and 2 out of the total sale consideration and the balance sum of Rs.22.50 lakhs remained payable. The said amount was payable by bank drafts at the time of execution of the sale deed and possession was to be given to the appellants after full payment and encashment of the bank drafts.

3. The Appropriate Authority-Income Tax Department by Order dated 10th July, 1987, decided to exercise its pre-emptive right to purchase the said property under Chapter XX-C of the Income Tax Act, 1961 (hereinafter referred to as the Act, for short). The Order passed by the Income Tax Department was made subject matter of Writ Petition No. 2275/1987 filed by the appellants. By an interim Order dated 26th August, 1987 it was directed that the possession of the property will be with the Income Tax Department and the same should not be disturbed. During the pendency of this Writ Petition, by an another interim Order dated 29th July, 1992, Rs. 22.50 lakhs was paid to the respondent nos. 1 and 2 by the Income Tax Department. The Court while passing the said Order noticed that Rs.1 lakh was payable to the appellants herein and the said amount would be paid whenever the appellants appear in the said proceedings.

4. Writ Petition No. 2275/1987 was disposed of vide Order dated 1st March, 1993 with a direction to the Income Tax Department to reconsider their decision for pre-emptive purchase of the property in view of the decision of the Supreme Court in ***C.B. Gautam versus Union of India*** reported in JT 1992 (6) SC 678. In this Order, the Court noted the submission of the learned counsel for the respondent nos.1 and 2 that they were entitled to interest in case of pre-emptive purchase.

5. By Order dated 5th November, 1993, the Income Tax Department again reiterated its earlier order and passed an order for pre-emptive purchase of the property.

6. Aggrieved, the appellants herein filed Writ Petition (Civil) No. 4357/1993 which was allowed vide Judgment dated 17th December, 1997. By the said Judgment, pre-emptive purchase Order dated 5th November, 1993 passed by the Appropriate Authority was quashed. The Judgment dated 17th December, 1997 was affirmed by the Supreme Court.

7. The appellants herein thereafter filed another Writ Petition (Civil) No. 5654/2001 against the Income Tax Department. This Writ Petition was disposed of on 12th December, 2001 with the direction that the appellants herein will deposit Rs.22.50 lakhs with the Income Tax Department and thereupon the said Department will issue 'no objection certificate' in Form No. 37-I and thereupon possession of the property will be handed over by the said Department to the appellants herein. The claim of the Income Tax

Department that interest on Rs.22.50 lakhs should be paid by the appellants was rejected. It may be noted here that the respondent nos. 1 and 2 were not present in the Court when Judgment dated 12th December, 2001 was passed. The said respondents thereafter filed an application, RA No.2299/2002, for review of the said judgment. The said application was disposed of vide Order dated 16th March, 2002 with the following observations:-

> "Even in the writ petition, the applicant herein had not sought to be impleaded as a party. It was never contended that the Agreement to Sell for one reason or the other has become unenforceable.
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> x x x x x
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> This Court while passing the said Order dated 12.12.2001 was not concerned with any inter-se disputes between the parties. If the applicant has any grievance(s) against the writ petitioner in relation to the said agreement for sale, it can agitate the same before the appropriate forum."

8. We have examined the copy of the Agreement to Sell dated 21st May, 1987 between the appellants and the respondents. The said Agreement nowhere states that possession of the property has been handed over to the appellants. It is further provided in the said Agreement to Sell that possession of the property would be handed over after encashment of the draft paid towards total sale consideration on execution of the sale deed. The Agreement also records that the sale deed would be executed within 60 days

after obtaining permission from the Income Tax Department and on failure of the appellants to pay the said amount, earnest money of Rs.1 lakh paid by the appellants would be forfeited.

9. It may be relevant to reproduce here some of the averments made in the plaint and the written statement. In paragraph 9 of the plaint, the appellants have stated that the respondent nos. 1 and 2 herein did not ask for possession of the property and the only request before the Writ Court was that they were entitled to interest on the delayed payment. The Court in its Order dated 1st March, 1993 allowed the respondents to raise this issue before the Appropriate Authority. In paragraph 20 onwards of the plaint, it is stated that the respondent nos. 1 and 2 herein have executed three separate sale deeds in favour of third persons who have been arrayed as defendants 3-5. It is alleged that the said sale deeds are forged and fictitious documents and part of a fraud played by the respondent nos. 1 and 2. It is further claimed that the same are null and void and unenforceable. Para 26 of the plaint reads as under:-

> "That the property grabbers like Defendants No.3 to 5 would have got made some fraudulent and fictitious documents may be in collusion with the Defendants No. 1 & 2 and hence the Sale Deeds dated 30.9.1988, 18.9.2000 and 22.9.2000 are liable to be declared as null and void; illegal; not enforceable; not binding on Plaintiffs and are liable to be ignored and set-a-side. The aforesaid Sale Deeds are also invalid and illegal. If the defendants No. 1 and 2 have executed this Sale Deed dated 30.9.1988 than also they could not

have dare and they had no authority to execute such Sale Deed and are barred by Section 52 of the Transfer of Property Act and that is by the principle of lis pendens.

The Sale Deeds dated 30.9.1988; 18.9.2000 and 22.9.2000 cannot prevent Plaintiffs from getting the Title Deeds executed from Defendants No. 1 and such Defendants as this Hon'ble Court deems fit and proper."

10. In the written statement, respondent Nos. 1 and 2 have stated as under:-

"That the defendant No. 1 and 2 were in USA in the year 1988 and they could not had signed or executed any sale deed at Delhi in respect of their property No. B.7/118, Safdarjung Enclave Extension, New Delhi on 30.9.1988. If there is any such document, the same is nothing but has been prepared by some miscreants after forging signatures of the defendant No. 1 and 2. These persons need to be brought to book and proseucted for the crime they have committed to sell the property of the defendants No. 1 and 2 in their absence from India. This Hon'ble Court may like to order detailed and discrete enquiry into the whole episode so that the culprits should not go scold free.

That in view of the facts as stated on behalf of Defendant No. 1 and 2, the suit for Specific Performance, Declaration, Perpetual and Mandatory Injunction and also in Aid of Specific Performance filed by the plaintiffs against the answering defendants is not maintainable as the agreement to seel made between the defendants and the plaintiffs has already expired and that there is no new agreement between the parties which now can be enforced. In fact the possession of the property in dispute which was taken over to the defendants No. 1 and 2 and not

> to the plaintiffs. Since the plaintiffs have taken over the property directly from the Income Tax Department, without involving the defendants, no suit for specific performance against the answering defendants lies.
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> That the contents of para 4 of the suit are not denied. The Appropriate Authority of the Income Tax Department asked the Defendant No. 1 and 2 to hand over the property under the same terms and conditions of the agreement dated 21.5.1987 and the defendatns were compelled to hand over the vacant possession of the suit propety under pressure and dures on 20.8.1987 alongwith original documents such as sale deed, sanctioned plans, completion certificate of the building and other necessary documents. The Income Tax Department, however, did not pay the amount of consideration money of Rs.23,50,000/- at that time. The defendants visited the Income Tax Office to collect the cheque for the promised consideration money on 21.8.1987, 22.8.1987 and 28.8.1987 but could fnot get the same. On 28.8.1987, the defendants were told that the plaintiffs M/s. Express Tower Pvt. Ltd. Had gone into litigation and the Hon'ble High Court had stoppd the payment. The defendants then left for USA on 29.8.1987 and came back to India only on 10.9.1991. Necesssary entries to this effect have been made of their departure from Delhi and arrived at USA are made in their passports (Passport No. L960044 on page 8 and 17 of Smt. Jeet Kaur and Passport No. M-165538 on pages 10 and 21 of Shri Mohan Singh). Copies of these passport are enclosed and marked as Annexure-D/1 Colly."

11. The respondent nos. 1 and 2 have not specifically disputed some facts in their written statement but have raised various pleas including the defence that the suit is not maintainable as Agreement to Sell between the

parties has already expired and the appellants had taken possession of the property from the Income Tax Department without either involving or getting consent of the said respondents. It is further stated that the said respondents were residing in U.S.A. and various orders were obtained by the appellants without proper service of notice on the respondents. It is pointed out that there was substantial delay in payment of the sale consideration even by the Income Tax Department and the respondent nos. 1 and 2 have not received Rs. 22.50 lakhs from the appellants but from the Income Tax Department. It is also stated that the Income Tax Department was not competent to transfer possession of the property to the appellants and the ownership rights still vests with the respondent nos. 1 and 2.

12. It may be interesting to note here that the appellants have also made Mr.Bijender Kumar, Mr. Niranjan Vasishtha and Mr. Shafiqur Rehman, as parties to the said Suit and impleaded them as defendants Nos. 3, 4 and 5. It is alleged in the plaint that the respondent nos. 1 and 2 have sold the property to the said persons by executing three registered sale deeds on different dates and mutation has been carried out in the records of the MCD. Allegations of fraud have been made. The respondent nos. 1 and 2 have denied executing any document in favour of the said persons and it is stated that the respondent nos.1 and 2 were in U.S.A. during the period between 29th August, 1987 to 10th September, 1991.The appellants, on the other hand, claim that these documents have been executed by the respondent nos. 1

and 2. The said defendants have been proceeded ex-parte and evidence has to be led by the parties. It is also the case of the appellants that execution of the said documents does not prevent the appellants from getting decree of specific performance.

13. It is well settled that pleadings including written statement have to be read as a whole to decide whether there is unequivocal and clear admission by a party. The respondent nos. 1 and 2 have denied executing any documents or sale deeds in favour of the defendant nos. 3-5 in the plaint. It is claimed that their signatures have been forged and the persons responsible must be brought to book and prosecuted. The defendants Nos. 3-5 have not appeared in the Suit and have been proceeded ex-parte. As noticed by the learned Single Judge, the Court has not proceeded under Order VIII and passed any decree. The appellants herein being the plaintiffs have been asked to lead evidence on the pleas and contentions raised. It is only after evidence is led and the respective claims and stands are adjudicated that it can be decided whether the alleged sale deeds are forged, fabricated and fictitious documents. The Court will also examine whether the appellants or the respondent nos. 1 and 2 were responsible for executing the said documents. Another contention raised by the respondent nos. 1 and 2 is that the Income Tax Department could not have handed over possession to the appellants. The Income Tax Department had taken possession of the property from the respondent nos. 1 and 2 and once the order passed under

Chapter XX-C of the Act was set aside and status quo ante was restored, possession should have been handed over to the said respondents. Another plea taken by the said respondents is that the Agreement which was entered into between the appellants and the respondent nos. 1 and 2 has already expired and there is no agreement between the parties which can be enforced. What is the effect of orders being passed by the Income Tax Department under Chapter XX-C of the Act on the said Agreement; whether the said Agreement can still be enforced as per clauses of the Agreement and understanding between the parties, are all matters which require adjudication. Parties must be given full opportunity to plead their case and establish it by leading evidence. Their right to have a fair trial should not be curtailed and scuttled. It cannot be said that the respondent nos. 1 and 2 have made unequivocal and unambiguous admission of facts which entitles the appellants to a decree on the basis of admissions. The respondent nos. 1 and 2 have also made claim for interest which fact is admitted in the plaint itself.

14. Under Order XII, Rule 6 of the Code, a decree can be passed or a suit can be dismissed when admissions are clear and unambiguous and no other interpretation is possible. The Court also is vested with a right to ask for independent corroboration of facts, even when denial in the pleadings is not specific. Right to pass a judgment or order under Order XII, Rule 6 of the Code is discretionary and not mandatory. It may not be safe and correct to

pass a judgment under Order XII, Rule 6 of the Code when a case involves disputed questions of fact and law which require adjudication and decision. Even when a party has made an admission, the Court need not dismiss or allow the suit. Judgment on the basis of admissions is not a matter of right but a matter of discretion for the Court. Similarly relief of specific performance is a discretionary relief. The discretion, whether or not a decree for specific performance of an immovable property should be passed, is to be exercised or rejected by taking into account several factors and circumstances. Conduct of the parties is also to be examined. In this regard it may be stated that the appellants have taken possession of the property from the Income Tax Department and the respondent nos.1 and 2 had not given possession of the property to the appellants. Section 20 of the Specific Relief Act reads as under:-

> **20.** *Discretion as to decreeing specific performance* .(1) The jurisdiction to decree specific performance is discretionary, and the court is not bound to grant such relief merely because it is lawful to do so; but the discretion of the court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a court of appeal.
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> (2) The following are cases in which the court may properly exercise discretion not to decree specific performance
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> (*a*) where the terms of the contract or the conduct of the parties at the time of entering into the contract or the other circumstances under which the contract was entered into are such that

the contract, though not voidable, gives the plaintiff an unfair advantage over the defendant; or

(*b*) where the performance of the contract would involve some hardship on the defendant which he did not foresee, whereas its non-performance would involve no such hardship on the plaintiff;

(*c*) where the defendant entered into the contract under circumstances which though not rendering the contract voidable, makes it inequitable to enforce specific performance.

Explanation 1 .Mere inadequacy of consideration, or the mere fact that the contract is onerous to the defendant or improvident in its nature, shall not be deemed to constitute an unfair advantage within the meaning of clause (*a*) or hardship within the meaning of clause (*b*).

Explanation 2 .The question whether the performance of a contract would involve hardship on the defendant within the meaning of clause (*b*) shall, except in cases where the hardship has resulted from any act of the plaintiff subsequent to the contract, be determined with reference to the circumstances existing at the time of the contract.

(3) The court may properly exercise discretion to decree specific performance in any case where the plaintiff has done substantial acts or suffered losses in consequence of a contract capable of specific performance.

(4) The court shall not refuse to any party specific performance of a contract merely on the ground that the contract is not enforceable at the instance of the other party."

15. The above Section was referred to by the Supreme Court in ***Jai Narain Parasrampuria versus Pushpa Devi Saraf***, reported in (2006) 7 SCC 756 and it was held that conduct of both the parties has to be examined before passing a decree for specific performace or awarding compensation. Reference was made to several Texts on equity and equitable remedies and circumstances/cases where damages can be awarded in substitution for an order of specific performance. The court also examined the question what should be the quantum and measure of compensation. In the said case, as the parties were guilty of serious misconduct and both of them had abused process of law by filing frivolous litigations and had suppressed material facts, the Supreme Court declined to grant decree of specific performance and directed that compensation should be paid. In the said decision, several earlier decisions of the Supreme Court have been referred to. In the case of ***Nirmala Anand versus Advent Corportion (P) Limited***, reported in (2002) 8 SCC 146 , the Supreme Court affirmed the principle that grant of decree of specific performance lies in the discretion of the court and decree will not follow as it is legal to do so. Several facts have to be taken into consideration including conduct of the parties, facts and circumstances of the case, though ordinarily a plaintiff would not be denied relief of specific performance only on account of abnormal increase in prices during the pendency of litigation. However, equities have to be balanced and the question, who is defaulting party and whether any party is trying to take

undue advantage over the other as also question of hardship has to be gone into and examined. Totality of circumstances have to be considered and in a given case phenomenal increase in prices during the pendency of litigation can be one of the considerations besides many others for refusing a decree of specific performance.

16. It may be also noted here that the Income Tax Department had sold the property in an open auction held on 17th September, 1993 for a sum of Rs.78.10 lakhs.

17. In view of the facts and circumstances stated above and the defence raised by the respondent nos. 1 and 2, we do not think that in the present case a decree on the basis of admissions under Order XII, Rule 6 of the Code should be passed. Various issues and contentions are raised and involved. We feel the present case requires adjudication of contentions which should be decided after regular trial. The respondent nos. 1 and 2 will suffer injustice and denied fair trail in case the suit is decreed at this stage. Keeping in view the facts mentioned above, we feel that the appellants should be asked to prove and establish their case in trial by leading evidence.

18. In view of the above, we do not find any merit in the present Appeal and the same is accordingly dismissed. It is clarified that the observations and findings recorded above are for the purpose of deciding the present appeal against an Order passed on an application under Order XII, Rule 6 of

the Code. The suit will be decided and disposed of on merits without being influenced by any observations made above.

No Costs.

(SANJIV KHANNA)
JUDGE

(DR. MUKUNDAKAM SHARMA)
CHIEF JUSTICE

SEPTEMBER 7, 2007.
P/VKR